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DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

In the Matter of Milk in California; Notice of Hearing on a Proposal to Establish a Federal Milk Marketing Order	7 CFR Part 1051 Docket No.: AO-15-0071; AMS-DA-14-0095

BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED ON BEHALF OF PONDEROSA DAIRY

I. INTRODUCTION

Ponderosa Dairy ("Ponderosa"), a Nevada dairy that has been selling milk into California for more than 22 years, submits this brief in support of its Proposal 4 and in response to the respective requests by California Dairies, Inc., Dairy Farmers of America, Inc., and Land O'Lakes, Inc. (collectively, the "Cooperatives") and the Dairy Institute that the U.S. Department of Agriculture's ("USDA") Secretary of Agriculture ("Secretary") establish a Federal Milk Marketing Order ("FMMO") governing California, pursuant to the Secretary's powers under the Agricultural Marketing Agreement Act of 1937, enacted as amended at 7 U.S.C. § 601, *et seq.*

As originally submitted, both Proposals 1 and 2 would require out-of-state producers to accept the blend price of a California FMMO, rather than the plant blend price that out-of-state producers have received since the inception of the Gonsalves Milk Pooling Act. Because of California's unique quota program, paying out-of-state producers the blend price (the pool blend less quota premiums and other costs), the out-of-state producer payments would be reduced by the premium payments made to quota holders even though the out-of-state producers would not

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have the opportunity to participate in the quota system program. Out-of-state producers would not be able to participate in the transportation benefits or fortification allowances either. The only justification for this disparate treatment is that the producers are outside the California state borders. (Tr. 2934:11-2935:12.)

During the September 22, 2015 through November 18, 2015 hearing before the USDA, both the Cooperatives and Dairy Institute seemed to soften in their approach, allowing out-of-state producers to participate in transportation and fortification benefits. Even with these modifications to their proposals, the disparate prices paid to out-of-state producers without the ability to participate in the premium quota payments cannot be remedied. If an FMMO is implemented in California, the only way to treat out-of-state producers fairly is to allow them to receive the plant blend price for milk delivered into California.

Ponderosa submitted Proposal 4 based in large part upon this concern for disparate treatment of out-of-state producers. Proposal 4 accomplishes the adoption of a lawful FMMO as well as the fair treatment of out-of-state producers that have invested substantial resources in facilities to sell milk into California.

II. PROPOSED FINDINGS OF FACT

A. PONDEROSA DAIRY

Ponderosa was founded in April 1994 in Amargosa Valley, Nevada, just seven miles from the California border. (Exhibit 178; Tr. 7590:17-7591:21.) The location was chosen for several reasons, including that water was readily available, existing alfalfa farming made dairy farming suitable, and the land was reasonably priced. (*Id.*) Ponderosa was opened to provide milk to a plant in Downey, California, approximately 280 miles from the dairy. (*Id.*) In evaluating the economics of developing Ponderosa, its principals made the decision to invest in the dairy despite knowing that it could not participate in the California quota program. (*Id.*) They

did so because, under California's quota program, Ponderosa could receive the "plant blend" for milk sold into California. (*Id.*)

Specifically, when Ponderosa was established, California producers establishing dairies were eligible to purchase or otherwise obtain quota or obtain transportation subsidies. (*Id.*) Out-of-state producers such as Ponderosa were not. (*Id.*) Out-of-state producers were allowed to receive the plant blend for their milk (the average class price based on the plant's utilization). (*Id.*) Though the plant blend is less than California Class 1 prices, it has been important to Ponderosa to essentially compensate it for not being able to own quota or obtain the benefit of transportation subsidies. (*Id.*)

B. OUT-OF-STATE PRODUCERS HAVE RECEIVED PLANT BLEND SINCE THE INCEPTION OF THE GONSALVES MILK POOLING ACT

Out-of-state producers have received the plant blend price for their milk delivered to California handlers since the inception of the Gonsalves Milk Pooling Act in 1967. (Tr. 7590:17-7591:21, 8119:10-21.) It was an intentional decision in California to allow out-of-state producers to receive the plant blend as a concession for not being able to participate in the quota program and other benefits offered by the California State Order System ("CSOS"). (Tr. 7591:14-17.)

Out-of-state producers have never had the opportunity to participate in the quota system; cannot earn, purchase, or own quota; and do not receive any quota premium payments from the California pool. (Exhibit 178.) Because out-of-state producers could not participate in the quota system, and could not ever own quota or receive quota premium payments, out-of-state producers negotiated their own price for their milk with their handlers. (*Id.*) From the plant blend price, an out-of-state producer is also responsible for paying its own transportation costs and cannot receive any benefits from the pool that are afforded to in-state producers. (Tr. 4088:19-4089:1.)

C. PROPOSALS (AS WRITTEN) WOULD TREAT OUT-OF-STATE PRODUCERS DISPARATELY

1. Disparate Treatment of Out-of-State Milk

Under both written Proposals 1 and 2, out-of-state producers would be treated differently than in-state producers for no reason other than their location outside the state boundary of California. First, out-of-state producers could not participate in the quota system program or receive any quota premium pricing for their milk. (Tr. 7590:17-7591:21, 1504:6-9.) This has been true since the inception of the Gonsalves Milk Pooling Act, but as a concession under the CSOS, out-of-state producers have historically received the plant blend price for milk delivered into California—the price negotiated between the farm and the handler. (Tr. 4088:22-4089:1.) The out-of-state plant pays all of its own transportation, and does not receive any transportation benefits from the pool. (*Id.*)

Second, out-of-state producers could not participate in the transportation credit system in the original written proposal submitted by the Cooperatives, although this portion of their proposal was later amended to remove geographic restrictions. (Tr. 7591:12-7593:15, 1504:21-23.) When out-of-state producers receive the plant blend price, they can offset that amount in their negotiated price. But if they receive the already reduced federal order blend price and have to absorb their transportation costs without any of the upside from the pool, the disparate effect is magnified.

Under a California FMMO as proposed, out-of-state producers would receive the blend price announced by the order for their milk. (Tr. 1502:1-15.) The "blend price" was also referred to by the USDA and others at the hearing as the "non-quota pool price," meaning that it is the blend price after a deduction is made to offset all of the premium quota payments made to in-state producers. (Tr. 1502:23-1503:3.) Elvin Hollon testified that out-of-state producers' blend

price would be calculated as follows: the federal order price, less quota premium payments paid to the quota holders, less transportation allowances, adding back regional quota adjusters. (Exhibit 64; Tr. 2931:16-2934:10.)

The Cooperatives calculated that their in-state producer prices would increase on average under their proposal, due in part to the increase to the pool from out-of-state producers that are not able to participate in the quota system. (Tr. 1503:11-17.) In other words, out-of-state producers would have a major change to their payment structure under a California FMMO by subsidizing the projected increase in producer payments to in-state producers without being able to participate in any of the benefits of the California FMMO pool.

If an FMMO is adopted in California without incorporating Proposal 4 (or language that has the effect of preserving plant blend payments to out-of-state producers), out-of-state producers will be punished so drastically that they could not travel across state lines to deliver milk to handlers inside California. (Tr. 7594:2-21.) And preserving the treatment for out-of-state producers in paying them the plant blend price will not create any disorder, due to the logistical issues with transportation across the mountains from Nevada into California and inability to brand any products produced with out-of-state milk with the "Real California" seal. (Tr. 7594:15-21.) The exemptions made for handlers in Clark County, Nevada (where Ponderosa is located) mean that those handlers do not have to pay the Nevada minimum pricing because they can purchase milk from California or Utah. (Tr. 1389:19-1397:11.) Faced with no outlet in Nevada, Ponderosa will be forced to accept the plant blend price, subsidizing the quota system without the ability to participate in the quota system's benefits, for the sole reason that its farm is located outside the California borders. As the only producer in Southern Nevada, the effect will be devastating to Ponderosa. (Tr. 7598:6-7.)

2. Concessions by the Cooperatives and Dairy Institute to Remedy Disparate Treatment Do Not Cure the Inequities.

On the final day of the hearing, Dr. Eric Erba, on behalf of the Cooperatives, acknowledged that the California Department of Food and Agriculture ("CDFA") has paid out-of-state producers the plant blend price since the inception of the Gonsalves Milk Pooling Act and that the Cooperatives were considering continuing that practice as part of their proposal for a California FMMO. (Tr. 8119:10-8120:8.) The Cooperatives also amended their transportation credit proposed language to allow for out-of-state producers to receive transportation benefits if they qualify as in-state producers must qualify. (Exhibit 192; Tr. 8063:10-8067:1.) The Cooperatives conceded that that they could remove the geographic limit and allow out-of-state producers to participate equally in the transportation credit system with the in-state producers. (Tr. 8067:3-17.) Ponderosa supports the Cooperatives' amended proposal with respect to the transportation credits and agrees that this eliminates disparate treatment to out-of-state producers with respect to the transportation credit portion of Proposal 1.

Likewise, the Dairy Institute softened its treatment for out-of-state producers in its proposal in an effort to neutralize the disparate treatment for out-of-state producers. The Dairy Institute amended its proposal to allow for out-of-state producers to receive the traditional blend price and transportation allowances. (Tr. 7134:8-16.) It explained that it made this amendment because "if that milk is in the pool and it's fully pooled and fully regulated, then it should enjoy the same benefits of other milk that's in the pool, be it fortification or transportation." (Tr. 7147:16-25.) While this change does not neutralize the inequities with respect to participation in the quota system (Tr. 7148:1-17), it does equalize the treatment with respect to the transportation benefits as proposed by the Dairy Institute.

The softening in both Proposals 1 and 2 with respect to transportation allowances reveals that the parties recognize the need for equal treatment, but the proposals still fall short because neither has a remedy for the out-of-state producer not being able to participate in the quota system. Even if given the opportunity to buy quota shares today, it would not make up for the lack of quota shares that could not be acquired over the past 49 years and it could not force others to sell their shares to out-of-state producers. There simply is no easy way to allow out-of-state producers to participate in the quota system. The only way to treat out-of-state producers equally and fairly, and to make up for the lack of ability to participate in quota premium payments, is to allow for out-of-state producers to negotiate their own price with handlers and receive what amounts to the plant blend price.

III. PROPOSED CONCLUSIONS OF LAW

A. OUT-OF-STATE MILK DOES NOT CAUSE DISORDERLY MARKETING CONDITIONS

For nearly 50 years, out-of-state producers have not caused any disorderly market conditions by receiving plant blend prices. The only evidence the Cooperatives offer concerning disorder purportedly caused by out-of-state milk was in the testimony of Elvin Hollon (Exhibit 19). There, the Cooperatives state that "there is milk produced on dairy farms located outside the state that is marketed to [California] Class 1 processing plants." (*Id.* at p. 16.) The Cooperatives also state that "CDFA data has indicated that this volume totaled 547 million pounds in 2014." (*Id.*) This is, however, undermined by the fact that the Cooperatives alone shipped out no less than 200 million pounds of bulk to out-of-state plants. (*See* CDFA Table S – Bulk Milk from California Cooperatives Diverted to Out-of-State Plants January 2000-June 2015.) But the volume of milk does not create disorderly market conditions. And given the limited number of producers that could deliver milk to California from out of state, due to the transportation costs and logistics of the mountains, there will be no deluge of producers coming to California. We

know this because even with plant blend prices paid today, there is only one producer in Southern Nevada shipping milk into California.

Additionally, the Cooperatives' position that out-of-state milk results in disorder is undermined by the USDA's economic impact analysis, which makes expressly clear that adoption of Proposal 4 will have a nearly identical effect on California non-quota and quota blend prices as Proposal 1. (Exhibit 5, p. 17.) This is highlighted by comparison of Tables B1 and B33 of Exhibit 5:

TABLE B1: Statistical Uniform Prices at 3.5 BF Changes under the Cooperative Proposal

	Units	2017	2018	2019	2020	2021	2022	2023	2024	Average	Min	Max
CA Statistical Uniform Price	$/CWT	0.92	0.88	0.89	0.91	0.94	0.97	1.01	1.03	0.94	0.88	1.03
CA Non-Quota Blend Price	$/CWT	0.95	0.90	0.91	0.91	0.93	0.95	0.98	1.01	0.94	0.90	1.01
CA Quota Blend Price	$/CWT	0.95	0.90	0.91	0.91	0.93	0.95	0.98	1.01	0.94	0.90	1.01

TABLE B33: Statistical Uniform Prices at 3.5 BF Changes under the Ponderosa Dairy Proposal

	Units	2017	2018	2019	2020	2021	2022	2023	2024	Average	Min	Max
CA Statistical Uniform Price	$/CWT	0.90	0.86	0.88	0.90	0.93	0.96	1.00	1.02	0.93	0.86	1.02
CA Non-Quota Blend Price	$/CWT	0.93	0.89	0.89	0.90	0.91	0.94	0.97	1.00	0.93	0.89	1.00
CA Quota Blend Price	$/CWT	0.93	0.89	0.89	0.90	0.91	0.94	0.97	1.00	0.93	0.89	1.00

Proposal 4's economic impact is likewise minimal for comparison of these categories under both proposals at blend prices at test. (*Compare* Exhibit 5, Table B2, *with* Exhibit 5, Table B34.)

Finally, the Cooperatives also state that "producer milk regularly leaves the California market and in our estimate delivers to a plant or plants pooled by FMMO 131 that market the milk back into the California market." (Exhibit 19, p. 16.) However, when pressed, the Cooperatives' witness conceded that he had no evidence of this. (*See* Tr. 954:14-23.)[1]

[1] "Q. Are you aware of times within the last decade in which California regulated minimum prices resulted in milk being moved out of state in order to avoid the regulated minimums in California? A. I'm aware of milk moving out of state because at that – at those points in time, there was not capacity to sell it. Q. Is there capacity to sell it now? A. Today? Q. Today[.] A. Yes."

The only evidence offered establishes that out-of-state producers do not cause any disorderly marketing conditions. In addition to what is outlined above, this is supported by the fact that handlers buying Nevada milk, for instance, pay the plant blend price – *i.e.*, the average of class utilization for the plant – and there has been no evidence that this has caused any disorderly conditions over nearly 50 years. Thus, handlers buying out-of-area milk face the same regulated prices as they do when purchasing from California producers. And out-of-state producers are not putting California dairies at a disadvantage. At all relevant times, out-of-state producers were allowed to receive the plant blend as compensation for not being awarded quota (even when it is reissued for new California dairies) and for not being able to obtain the book value of quota. (Tr. 7591.) The California quota system's treatment of out-of-state producers allows for their *fair*, not better, treatment. Furthermore, as Ponderosa's principal testified, "many products are labeled with the Real California milk and cheese seals, making those products more attractive to California consumers. Milk from out-of-state producers cannot be used to produce products with those seals. Also, the plant blend that Ponderosa Dairy receives is less than the Class 1 price." (Tr. 7596.)

B. THE FMMO CANNOT DISCRIMINATE AGAINST OUT-OF-STATE PRODUCERS

7 U.S.C. § 608c(5)(G) provides that "[n]o marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States." As the Supreme Court stated in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 97 (1962), "the word 'prohibit' refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers ...." Notably, the Court in *Lehigh Valley* "did not strike down all compensatory payments," *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 314 (3d Cir. 1968), but only those charges that "[bear] no relation to the actual cost of the milk," *id.* at 313, or to the nonpool

"handler's competitive advantage," *Fairmont Foods Co. v. Hardin,* 442 F.2d 762, 771 (D.C. Cir. 1971).

In *Hillside Dairy, Inc. v. Kawamura,* 317 F. Supp. 2d 1194, 1197 (E.D. Cal. 2004), California processors purchasing out-of-state milk were required to pay into the pool the difference between the gross pool obligation and the lesser of plant blend or modified quota. In effect, this meant that out-of-state producers were subsidizing California's quota program and were receiving at best the modified quota price, which the court found did not encompass all of the benefits of quota. Thus, the court concluded that "[s]ince the 1997 amendment to § 900 requires out-of-state raw milk producers to pay for benefits received exclusively by California dairy businesses, it is similar to the milk pricing order in *West Lynn,*" and the regulation was discriminatory. *Id.* at 1198. The Supreme Court held that the Federal Agriculture Improvement and Reform Act of 1996 did not immunize milk pricing and pooling laws from Commerce Clause challenges, and remanded the case back to the district court for a determination of whether there was a Commerce Clause violation. The Supreme Court further held that it did not matter that the regulation did not draw a distinction on its face between in-state and out-of-state producers; the disparate effect of a pricing regulation that treated the two differently was sufficient. *Id.* The Court quickly held that it was a violation of the Commerce Clause to disallow out-of-state producers from participating in the financial benefits of the pool, but then subject them to pricing from the pool reflecting a diluted blend price. Notably, the regulation at issue in *Hillside* was less burdensome than the current proposal.

The discriminatory treatment to out-of-state producers proposed by both of the FMMO proposals is likewise prohibited. That was settled in *Lehigh.* There, the Supreme Court studied the legislative history of section 608c(5)(G) and determined that it "was compendiously intended

to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products." *Lehigh*, 370 U.S. at 97. Specifically, a compensatory payment was held to run afoul of section 608c(5)(G) because it involved a payment for out-of-area milk through the handler that effectively neutralized the ability of out-of-area milk to compete. *Id.* at 89-90. There can be no doubt that discrimination – based on geographic location outside of the marketing area and aimed at subsidizing better pool prices for those inside the marketing area while denying the same benefits to those outside – is a trade barrier and is inconsistent with *Hillside* and *Lehigh.*

In this case, the evidence is uncontroverted: the only reason that out-of-state producers are proposed to receive a diluted and reduced plant blend price without the opportunity to participate in the upside premium pricing is because their farms are located outside California borders. (Tr. 2934:11-2935:12.) Such a discriminatory effect is clearly prohibited by the Commerce Clause.

C. THE FMMO PROPOSALS ARE DISCRIMINATORY

1. Cooperatives' Proposal 1

Under Proposal 1, advanced by the Cooperatives, out-of-state producers are subject to "mandatory pooling." Specifically, proposed 7 C.F.R. § 1051.12 (Proposal 1) states that a "*producer* means any person who produces milk approved by a duly constituted regulatory agency for fluid consumption as Grade A milk and whose milk is … [r]eceived at a pool plant directly from the producer or diverted by the plant operator[.]" In turn, section 1051.7 of Proposal 1 states that a "*[p]ool plant* means a plant . . . specified in paragraphs (a) through (d) of this section, but excluding a plant specified in paragraph (f) of this section." Section 1051.7(c) of Proposal 1 includes in the definition of "pool plant," "[a] plant that is located in the marketing area which during the month receives milk from a producer located in the marketing area or from

a cooperative marketing the milk of a producer located in the marketing area pursuant to § 1051.9(c)." Thus, once a plant is a pool plant, all milk shipped from there is considered producer milk and subject to the Cooperatives' proposed FMMO. *See proposed* 7 C.F.R. § 1051.13(a) (Proposal 1) (defining "producer milk" as including milk received by the operator of a pool plant).

Despite the mandatory pooling of milk from out-of-state producers, many of the benefits from pooling are available only to in-state producers. *First*, out-of-state producers will never be able to participate in enhanced quota and overbase prices, despite the fact that the mandatory pooling provisions would require milk of out-of-state producers to subsidize the higher quota premiums paid to in-state producers. (*See* Elvin Hollon Testimony, Sept. 30, 2015.) Specifically, under section 1051.61 (Proposal 1), after combining all values into a single milk sales revenue pool and making the necessary adjustments to that revenue pool (described in section 1051.60), the marketing administrator must deduct from the revenue pool an amount equivalent to the quota premium as reported to the marketing administrator by the CDFA prior to calculating any milk component prices. Indeed, under sections 1051.71 and 1051.72 (Proposal 1), the producer settlement fund is used to pay for quota: "One significant difference for the California FMMO is that the additional value resulting from a handler receiving milk covered by quota is credited to the handler from the producer-settlement fund." (Exhibit 42, 10/6/15 Testimony of Dr. Erba.)

Second, out-of-state producers do not get transportation credits. Specifically, section 1051.55(1) (Proposal 1) provides that "the market administrator shall pay to each handler . . . milk directly from producers' farmers as specified in paragraph (b)(1) to plants as specified in

(b)(1) and (2) of this section[.]" Subdivision (b)(1) identifies farmers in various California counties, but notably does not identify any farmers outside California.

2. Dairy Institute's Proposal 2

Though there would be less of a discriminatory impact under Proposal 2, advanced by the Dairy Institute, a discriminatory impact and trade barrier would nevertheless result. Under Proposal 2, California farmers would essentially have the option to irrevocably "opt in" to the FMMO system. Absent opting in, the California farmer would be paid quota and overbase prices based upon an allocation called for under Proposal 2. Proposal 2 would essentially establish two separate pools, which would be funded by revenue from all milk. One pool would be dedicated to those proceeding under the FMMO, and one pool would be dedicated to quota holders (including overbase). The pool dedicated to quota holders would be funded by the FMMO blend value of the milk of quota holders. CDFA would, in turn, redistribute and reallocate that sum to those proceeding under the quota system.

Specifically, under section 1051.68 (Proposal 2), a farmer must choose to participate in *either* quota or the FMMO price. If the farmer chooses to participate in FMMO, it is "irrevocabl[e]." Notably, a quota holder's election is irrelevant to the calculation of the value of milk of all milk producers. *See proposed* 7 C.F.R. §§ 1051.60, 1051.68, 1051.72(c)(2) (Proposal 2). Once the federal order blend is determined for all milk used in California, that order blend price would effectively be paid to farmers under the FMMO system, or that blend price for all farmers under California quota system would be paid to the CDFA's Milk Pooling Branch, to be reallocated and distributed as quota and overbase payments.

As indicated above, though Proposal 2 would result in *less* of a discriminatory impact on out-of-state producers, such an impact nevertheless rises to impermissible levels if Proposal 2 is

adopted. In short, out-of-state producers would be forced to receive a lower federal order blend price, as compared to their plant blend price. This pooling would necessarily result in higher payment to quota holders for the same milk; otherwise, quota holders would irrevocably opt out of quota. The Dairy Institute's own experts recognize that this beneficial subsidy for quota would last for a significant period of time.

3. Ponderosa's Proposal 4 Avoids Constitutionality Issues

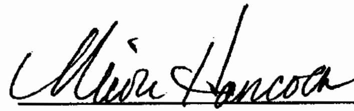
Ponderosa's Proposal 4 is the only way to avoid constitutionality issues. As discussed above, Proposals 1 and 2 result in out-of-state producers supplementing a quota that they can never receive. Quota has value in providing for a guaranteed stream of income, as well as a book value. Under Proposals 1 and 2, out-of-state producers would be subsidizing these values, subsidies that would make it economically infeasible for out-of-state producers to sell milk into California. This result is impermissible, especially in view of the Cooperatives' failure to produce any evidence that out-of-state producers are causing any disorder.

IV. CONCLUSION

Based upon the foregoing, Ponderosa respectfully urges the Secretary to incorporate the substance of Proposal 4 in any California FMMO in order to allow out-of-state producers to receive the plant blend price and avoid any discriminatory treatment to out-of-state producers.

March 30, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2016, I served a copy of the foregoing **BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED ON BEHALF OF PONDEROSA DAIRY** on the following, in the matter indicated below:

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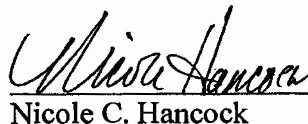

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